No. 42223-9-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF:

TERRELL JONES,

Petitioner.

REPLY IN SUPPORT OF PERSONAL RESTRAINT PETITION

Jeffrey Ellis #17139
Attorney for Mr. Jones

Law Office of Alsept & Ellis
621 SW Morrison St., Ste. 1025
Portland, OR 97205
(206) 218-7076
JeffreyErwinEllis@gmail.com

A. INTRODUCTION

The total time spent imprisoned and on community custody cannot exceed the statutory maximum for the crime. When it does, the sentencing court must reduce the community custody term. RCW 9.94A.701(9). When it might, the sentencing court must note on the judgment that the combined terms cannot exceed the statutory maximum.

Like the length of a term of incarceration, the length of community custody is a direct consequence of a guilty plea. Where the maximum punishment allowed by law results in interplay between the term of imprisonment and the corresponding term of community custody, that too is a direct consequence requiring accurate advice at the time of the guilty plea.

In this case, Mr. Jones was told in one place on his guilty plea form, that he faced 12 months of community custody, and if his earned early release time was less than 12 months, then his term of community custody would still be 12 months. In another place, Jones was told that he would be sentenced someplace within the range of 9-18 months (or more) on community custody. Both sets of advice were incorrect. Under the law, community custody was not a range, but was set at 12 months. However, the law further provided that if Jones earned less 12 months good time, his community custody term had to be equal to that earned time. Jones was

told the opposite—if he earned less than 12 months good time on his 60 month sentence, 12 months was the required length of his community custody term.

In response, the State argues that Jones did not need to be given accurate information about this consequence of his guilty plea. However, the State fails to explain why this direct consequence is exempt from the well-established rule that a guilty plea cannot misinform a defendant about any direct consequences. In addition, the State argues that Jones must show additional prejudice in order to prevail in a PRP. Caselaw explicitly holds otherwise.

B. ARGUMENT

1. The Facts are Clear: Jones Was Given Misinformation.

The facts are historical and largely uncontested.

However, the State begins its response by arguing that Jones' plea form does not misleadingly suggest that his combined incarceration and community custody time could exceed 5 years. Reading the plea form tells us otherwise.

Terrell Jones pled guilty to five crimes as part of a "package deal." Those charges included one count of a felony violation of a domestic contact order, a Class C felony with a five year maximum. In the section setting forth the standard sentence ranges and terms of community custody, the plea form was filled in and states Jones' "standard range" was a set term

of 60 months, and that his community custody term was 12 months. *Guilty Plea Form*, section 6 (a). Subsection (f) of paragraph 6 then misstated the term of community custody as a 9 to 18 month range. That subsection also stated "if the period of earned early release is longer" than the specified term of community custody, "that will be the term of community custody." In the portion of that subsection setting forth the "community custody" term, the plea form stated the court was required to impose "whichever is longer" of the two terms. *Id.*

At no point was Jones told that the combined term of incarceration and community custody could not exceed 5 years.

As a result, Jones was told that community custody would be either 9-18 months; 12 months; or longer than any of these terms if he earned more than early release time than the term of community custody imposed by the sentencing court. The language "whichever is longer" made it clear that the community custody term could exceed Jones' earned early release time.

The error was not corrected. It was repeated. At sentencing, Mr. Jones was sentenced to 60 months on the "no contact order" conviction, to be followed by the *longer term* of 12 months or the period of earned early release.

2. The Law is Clear: Jones Is Entitled to Withdraw His Plea.

Due process requires a guilty plea to be knowing, voluntary, and intelligent. *In re Pers. Restraint of Isadore,* 151 Wn.2d 294, 297, 88 P.3d 390 (2004). A guilty plea is not voluntary when it is based on misinformation regarding a direct consequence. *Isadore,* 151 Wn.2d at 298. Community custody or placement is a direct consequence of pleading guilty. *Isadore,* 151 Wn.2d at 298; *see also State v. Rawson,* 94 Wn.App. 293, 295, 971 P.2d 578 (1999). In addition, the maximum sentence for a crime is a direct consequence. *State v. Vensel,* 88 Wash.2d 552, 555, 564 P.2d 326 (1977).

The State argues that it does not legally matter if Jones was misinformed. The State argues the failure to explain that the combined incarceration and community custody terms cannot exceed the statutory maximum is not equivalent to failing to advise a defendant that a term of community custody is legally required. *Response,* p. 5. In other words, the Sate suggests that as long as Jones knew he faced some term of community custody, it did not matter if he was misled about the potential length of that term.

The State further argues "(t)here is no published authority that a defendant must be advised, prior to entering his plea, that the time he spends incarcerated combined with the time he spends on community custody cannot exceed the statutory maximum." *Id.* However, the State

makes no effort to distinguish the cases that say misinformation about a direct consequence of a guilty plea renders that plea involuntary. Nor can the State seriously contend that a defendant need not be given accurate information about the length of a sentencing requirement or about the maximum sentence.

Mr. Jones was misinformed about the direct consequences of his plea in several ways. Part of his plea expressed the community custody term as a range of 9-18 months. In 2009, before the current charges, the legislature adopted Engrossed Substitute Senate Bill 5288 (ESSB 5288), which amended former RCW 9.94A.701 by removing the language that had first appeared in former RCW 9.94A.715 permitting variable terms of community custody. LAWS OF 2009, ch. 375, § 5. In its place, the legislature added new language requiring sentencing courts to impose fixed terms of 36, 18, or 12 months of community custody, depending on the type of offense. *Id.;* RCW 9.94A.701(1)-(3). In this case, the fixed term was 12 months—not 9 -18 months. As a result, the community custody range listed one place in the guilty plea was erroneous.

However, even putting that error aside, RCW 9.94A.701(9) specifies that the other term of community custody specified in the form (12 months) shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

LAWS OF 2009, ch. 375, § 5. These amendments took effect on July 26, 2009. As of that date, a defendant who is told otherwise is given misinformation about a direct consequence of his plea.

In re Quinn, 154 Wn.App. 816, 836-37, 226 P.3d 208 (2010), provides further support because it holds that misinformation about the length of community custody constitutes misinformation about a direct consequences of a guilty plea. In that case, Quinn was told that he would serve a community custody term of 36 to 48 months after fulfilling his term of confinement. By statute, Quinn was subject to a mandatory life term of community custody. "It is established that Quinn was misinformed about the consequences of pleading guilty. Therefore, his guilty plea was not knowingly, intelligently, and voluntarily made. He is entitled to withdraw it." *Id.* at 841.

The same is true in this case. According to the State's logic, as long as a defendant is told about community custody, he can be incorrectly advised about the length of the term. If that were the case, a defendant could be given inaccurate information about the standard sentence range—a position firmly rejected by Washington courts.

Finally, the State argues that Jones needs to show some additional prejudice in addition to misinformation about a direct consequence of his plea. The State overlooks several cases that hold otherwise.

In re PRP of Bradley, 165 Wn.2d 934, 205 P.3d 123 (2009), involved misinformation about a direct consequence of a guilty plea. It was also a case where it was fairly obvious that the error had no effect on the decision to plead guilty—because it had no practical effect on the sentence. It was also a PRP. Despite all of these facts—facts which the State argues are material—the Washington Supreme Court granted Bradley's request to withdraw his plea. In fact, the *Bradley* court rejected an argument similar to the one advanced by the State in this case. In *Bradley,* the State argued that defendant must show additional prejudice, namely that the error was material to his decision to plead guilty—the same argument the State makes in this case. *Bradley* rejected that position. The Court held:

> Thus, we reject the State's invitation to consider the practical effect of Bradley's actions, as well as what the State itself might have done under other circumstances. This court cannot rewind the clock and put itself in the shoes of the prosecutor and the defendant as they entered into this plea agreement. As we observed in *Isadore:* "This hindsight task is one that appellate courts should not undertake. A reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision." *Id.*

Id. at 940.

Quinn, cited by Jones, but not discussed by the State, was also a PRP. That case also did not require the kind of prejudice urged by the State in this case. Instead, the rule is clearly established and applies with equal force to direct appeals and PRPs: Material misinformation about a

direct consequence of a guilty plea constitutes a manifest injustice and is all that is required in order to prevail in an appeal or in a PRP.

D. CONCLUSION

Based on the above, this Court should vacate Jones's judgment and remand this case to permit Jones to withdraw his guilty pleas.

DATED this 19th day of December, 2011.

Respectfully Submitted:

/s/ Jeffrey E. Ellis
Jeffrey E. Ellis #17139
Attorney for Mr. Jones

Law Office of Alsept & Ellis
621 SW Morrison St., Ste. 1025
Portland, OR 97205
(206) 218-7076
JeffreyErwinEllis@gmail.com

CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Alsept & Ellis, LLC, certify that on December 20, 2011 I served the parties listed below with a copy of Petitioner's Reply Brief as follows:

Anne Cruser
Clark County Pros. Attorney
1013 Franklin St.
PO BOX 5000
Vancouver, WA 98666-5000

Dec 20, 2011 Sea, WA
Date and Place

Vance G. Bartley